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From Censors and the Law by Neville March Hunnings *and* Censorship of the Movies: The Social and Political Control of a Mass Medium by Richard S. Randall

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cerned with matters of literary value and wastes no sympathy on them. He asserts that Mishkin's books are prurient trash, and that Ginzberg was clearly pandering.[24]

In a closing chapter the author reflects briefly upon the world beyond the end of obscenity. He suggests first that a scintilla of evidence of value may not satisfy the "utterly without any value" test. The value must be discernible and demonstrable and must pervade the work—not just a few paragraphs.[25] Secondly, he suggests that other media may also pose problems of invasion of privacy or public decency, and that different results may follow from litigation involving these.

Perhaps obscenity law has been too preoccupied with erotic effect, the appeal to prurient interest and the clear and present danger of some unlawful act. Also at stake is an aesthetic interest and an interest in privacy. As the author puts it:

> [T]hat public things should be decent is not, intrinsically a bad idea. Perhaps the orthodox libertarian will find the idea more acceptable if it is put in terms of aesthetics. Consider it a form of zoning. . . . In public, a variety of rights run their course, and the traffic must be regulated. Along with the right of privacy, there can be said to be a duty of privacy.[26]

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FILM CENSORS AND THE LAW. By Neville March Hunnings. New York: Hilary House, 1968. Pp. 474. $12.50.

CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM. By Richard S. Randall. Madison: University of Wisconsin Press, 1968. Pp. xvi, 280. $7.95.

These two recently published volumes on film censorship provide a number of contrasts. The Hunnings work is descriptive, with little analysis; the Randall book contains much factual material thoroughly analyzed. The former deals with several countries, the latter only with the United States. The former is narrowly legal, while the latter deals not only with the law but also with movies as a medium of communication in a democratic society. Perhaps the largest difference is

[24] *Id.* at 407-08, 428-34, 484-85.
[25] *Id.* at 489.
[26] *Id.* at 511.

that Hunnings' book is a crashing bore while Randall's is exciting and adds much to what we already know.

The principal fault of *Film Censors and the Law* is that its author has not taken the time to organize a framework within which to incorporate the many miniscule facts with which he deals. One finds long quotations from statutes and regulations (sometimes interrupted by only a few lines of text) with little explanation of what led to them and much superficial history with no underlying theme.

In England, the country to which Hunnings devotes the most attention, early control of the movies came through regulation of music halls, where films were first shown, because of fire danger from the buildings and the film itself. When the English film industry's efforts to get the Home Office to act as an appellate censor and thus legitimator for the industry were rebuffed, an industry-sponsored board utilizing a seal of approval was created. Unlike the American Production Code Authority (PCA), the British board relies on certain general principles, rather than utilizing a fully developed code. Hunnings asserts that although the English film board is technically independent it is actually dependent on the trade, local authorities, and private groups—but one finds no explanation with respect to either the trade or private groups. The author does discuss thoroughly the industry's problem with local city councils which are often unwilling to surrender the power of ultimate judgment, thus scuttling attempts at national government censorship. (The local boards do, however, generally accept the film board's rulings.)

Hunnings claims it is unimportant for us to know which films are banned. If one is to get an accurate picture of censorship, one must know more than what led historically to present rules and what those rules are. How they are applied—what the rules are *in practice*—is crucial. Hunnings also does not deal with the day-to-day work of censorship groups; to ignore social pressures for censorship is to provide a sadly elliptical picture. These defects might be forgiven if Hunnings had produced a solid piece of legal analysis or a thorough description of the administrative aspects of censorship, but the book generally does not meet standards of good scholarship in the field of constitutional law.

In no sense can the book be called comparative. Hunnings claims that "each [national] system must be considered from the point of view of its own social, political and legal environment,"[1] an approach which would stress each country's idiosyncracies rather than its similarities to other nations, but Hunnings does not look at the various

[1] N. HUNNINGS, FILM CENSORS AND THE LAW 392 (1968).

countries even in the terms he has proposed. England, four federal countries (United States, India, Canada, Australia), and three European countries (Denmark, France, Soviet Union) are the ones with which Hunnings deals. This classification might make sense if it were related to different types of censorship, but it generally is not. For each country, one is given the same tedious description of basic law and comes away having learned very little about *why* censorship takes the form it does. Some attempt to analyze differences between the countries is made in the last chapter, where the importance of central government-local government power relations is stressed. However, this discussion is insufficient to redeem the lack of analysis in the remainder of the volume.

In writing about the United States, Hunnings describes legal developments in individual states before discussing Supreme Court cases, surely an inverse treatment. The English reader will benefit from his development of the extension of the First Amendment through the Fourteenth Amendment as a prohibition against the states, one of the book's less equivocal portions. Hunnings claims the PCA provided the movie industry "breathing space" against demands for censorship, although he recognizes it is less effective now than earlier because of the trend against censorship in judicial decisions. He also feels it now is carried along only by its own momentum. He hardly mentions American private groups interested in censorship, the exception being a brief reference to the Legion of Decency's pressure on the PCA years ago. (In comparing Russia and the United States, Hunnings makes an effort to compare the Communist Party's pressure to that of the American Catholic Church, but calling the Russian Communist Party "an unofficial group"[2] is hardly accurate.)

In concluding, Hunnings adopts the standard libertarian doctrine and argues that "if a country is to have a film censorship, it is more consonant with freedom of speech that it should not be controlled by the government."[3] If one were to ignore "informal" censorship, Hunnings' argument might be valid; if one sees the severe effect informal censorship can have, one is far more cautious. Hunnings also claims that the issue of prior restraint versus subsequent criminal punishment has been so much discussed that nothing can be added. Randall clearly shows that more *can* be said than has been written previously, just as he raises a serious question about Hunnings' abovementioned assertion by discussing informal censorship.

Randall's interesting and well presented thesis is that prior re-

[2] *Id.* at 386.
[3] *Id.* at 394.

straint (with proper controls) can serve as a protection against more virulent and/or erratic censorship pressures from private groups. While this argument would have some validity even without tightened procedural safeguards in the licensing area, it is even more accurate now in the light of the *Freedman* case,[4] because the government must now bear the burden of showing that a movie should be denied a license by going to court to get the censor's order upheld.

Unlike Hunnings, Randall appreciates the full range of censorship: censorship exists not only in law, but also in self-censorship, the extra-legal activities of public officials, group action of both public and private varieties, as well as patron and parental sovereignty (free choice). He postulates an inverse relationship between informal censorship and prior restraint, and the hypothesized relationship is generally confirmed by the material he presents, although he recognizes the difficulty of estimating the effect of informal control because of exhibitors' anticipatory action in the face of possible public activity. His case concerning the dangers of informal censorship is devastating; he shows that matters other than the film itself (advertising, previous films shown by a particular theater, reviews) may trigger informal censorship, while in prior restraint only the film is at issue; that standards applied are far more broad and that few procedural safeguards exist in informal censorship; and that the private citizen, dealing with only a relatively small number of films, lacks the government censors' basis for comparison. One minor complaint: more community studies like the one of the harrassment received by Nico Jacobellis would have strengthened Randall's argument on the point that informal community pressure is the most effective form of censorship.

Randall also raises serious questions about the device of subsequent criminal prosecution for controlling undesirable movies. The expense of the procedure required to prosecute tends to limit its use, while the uncertainty of not knowing what films will subject someone to arrest affects most acutely the exhibitor, the one least able to bear the economic burden of a case. Although distributors and producers often contribute to or jointly handle the defense in such cases, *any* type of censorship, unless centralized at the national level, is likely to hurt the exhibitor.

The author, a political scientist, has produced an analysis conditioned by a thorough understanding of movies as a medium of communication. His appreciation of the operation of the movie industry is shown by his mention of "hot" and "cool" versions of movies and his

[4] Freedman v. Maryland, 380 U.S. 51 (1965).

comment that the movies lack a control mechanism like that part played by advertising in television and the newspapers. He shows that because movies "were the first medium of communication without roots in either elite or folk culture,"[5] they became a matter of intense public concern. That movies are a *mass* medium, particularly one dealing with the same material found earlier only in books, leads Randall to pose the philosophical question of whether a "free speech society" and a "mass democratic society" can co-exist. Censorship interests are a political force and cannot be either dismissed in a democratic society or fully dealt with in a legal setting.

In all this, Randall does not ignore the law. His analysis of the *Mutual Film* case[6] is extremely thorough. Instead of joining the heated *ex post facto* criticism others have made of the decision, he brings law and the state of the medium together to show why the Court decided that movies were not to be included in the protections granted speech. *Mutual Film* came at the "nickelodeon stage" of the industry's development, when no one thought that films involved dissemination of ideas. Thus the state of the industry affects law, but the reverse is also true; for example, *Burstyn v. Wilson* (the "Miracle" decision)[7] helped stimulate sophistication in both film subject-matter and treatment.

The newness of case law in the movie regulation area is shown by the fact that *Freedman* was the first Supreme Court case dealing with licensing *procedures,* although the question of prior restraint per se had been raised earlier. While *Freedman* appears to deal only with procedures, Randall shows that in effect the decision overrules the *Times Film*[8] holding that a film must be submitted for showing; in *Freedman,* the exhibitor had shown the film without first submitting it, yet the Court allowed his challenge of the Maryland law. It is a commentary on the speed of censorship and obscenity law developments that each new book is barely off the press before some new relevant decision is handed down. After the publication of Randall's book, the Chicago movie censorship ordinance and the Dallas age classification device were struck down, the former on *Freedman*-type grounds,[9] the latter under the doctrine of vagueness.[10] In addition, the Court's approval in the *Ginsberg* case[11] of New York's "harmful"

[5] R. RANDALL, CENSORSHIP OF THE MOVIES 9 (1968).
[6] Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915).
[7] 343 U.S. 495 (1952).
[8] Times Film Corp. v. Chicago, 365 U.S. 43 (1961).
[9] Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968).
[10] Interstate Circuit, Inc. v. Dallas, 390 U.S. 675 (1968).
[11] Ginsberg v. New York, 390 U.S. 629 (1968).

materials statute has clear implications for film classification and shows the Court's willingness to deal with more than "obscenity."

Randall claims that classification places no "direct" burden on adult freedom of expression. This, however, ignores the argument (which Randall himself mentions later) that exhibitors won't show a film labelled "Adults Only" because of a loss of family business. Classification also may increase the number of "borderline" films shown, as indicated by the increase of "Adult Only" moviehouses in Dallas after passage of that city's classification ordinance.

In dealing with censorship in operation, Randall concentrates on state and local levels, although there is a brief but thorough discussion of the Customs Bureau's work. This emphasis reinforces the point that the United States is one of only a few countries without national censorship of movies. There is a far more thorough treatment of censorship boards and the process of distributor-censor interaction than *Carmen*[12] showed. That Randall discusses censorship practices topically and comparatively, rather than board-by-board, contributes greatly to our understanding. Description of the application of standards shows how narrowly circumscribed substantively (as well as procedurally) censorship has become. Censors now follow religious groups' feelings less, and little pressure is brought by groups directly on the censors because there is little room in which censorship boards may maneuver because of present court rulings. Government lawyers are also a restraining influence on the censors, because they realize the difficulties of taking the censors' decisions to court and winning.

Like Hunnings, Randall shows the loss of effectiveness of the PCA code, attributing it to successful anti-trust action against picture companies[13] and the feeling that the companies mainipulate the code for themselves. The code has, however, been more restrictive than the law: no obscenity cases involving movies granted "the seal" have occurred; movies not submitted for approval become the subject of cases. PCA effectiveness is greatest, Randall asserts, in the pre-production stage (the same stage at which Russian censorship operates). The purpose of movie industry self-regulation is not censorship, Randall argues convincingly, but protection against economic loss. In this connection, he notes the conflict of goals which ratings (the "Green Sheet") pose for the industry; they have public relations value but become an economic liability to the extent they serve as a classification device and limit audiences. Movie exhibitors are not, it should also be

[12] I. CARMEN, MOVIES, CENSORSHIP, AND THE LAW (1966), reviewed, Wasby, 56 KY L. J. 249 (1967).

[13] United States v. Paramount Pictures, 334 U.S. 131 (1948).

pointed out, opposed to licensing; like book distributors, they want guidance on ways of avoiding risks of being arrested and having to go to court.

Randall's book is an imperative addition for the bookself of those concerned with civil liberties, obscenity, and the mass media. Unfortunately, Hunnings' book, overpriced to begin with, is best not purchased.

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